

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Spring Design, Inc.,

NO. C 09-05185 JW

Plaintiff,

**NOTICE OF INTENT TO APPOINT A
SPECIAL MASTER**

v.

Barnesandnoble.com, LLC,

Defendant.

At the November 30, 2009 hearing on Plaintiff's Motion for a Preliminary Injunction, the Court suggested the appointment of a Special Master to assist in the management of this lawsuit to ensure that the case advances at an appropriate pace. The parties were agreeable. Due to the parties' consent and the cost savings to the parties which will result from a more focused management of pre-trial matters, the Court concludes that the appointment of a Special Master in this lawsuit would be beneficial to all. Pursuant to FED. R. CIV. P. 53, the Court notifies the parties of its intent to appoint a Special Master.

A. Scope of the Special Master's Appointment

The Special Master shall preside over all proceedings, with the power to hear and make reports and recommendations on the following pretrial matters:

- a. Timing of pre-answer motions or any responsive pleadings;
- b. Timing and content of initial disclosures;
- c. Case development processes (e.g., staged discovery and discovery schedules or plans);
- d. Disclosures or discovery;
- e. Disclosures or discovery disputes;

f. Limits on the number of party experts.

Furthermore, the Special Master shall have the authority to:

g. Conduct pretrial conferences and hearings to establish:

- (1) The substance of the claims and defenses presented in the case and of the issues to be decided;
- (2) The material facts not reasonably disputable;
- (3) The disputed material factual issues;
- (4) The relief claimed, including a particularized itemization of all elements of damages which may reasonably be claimed based upon the evidence which would be presented at trial;
- (5) The pertinent undisputed and disputed points of law, with respect to liability and relief, including proposed jury instructions;
- (6) The witnesses necessary to be called at trial, except for impeachment or rebuttal, together with the substance of the testimony to be given;
- (7) A compilation of all documents and other items necessary to be offered as exhibits at trial, except for impeachment or rebuttal, together with a brief statement following each item describing its substance or purpose and the identity of the authenticating witness;

h. Audit and establish attorney fees to be awarded, if any.

The Special Master shall exercise the power necessary or proper to regulate all proceedings before him and shall do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order.

The Special Master shall file numbered interim reports or recommendations which: 1) advise this Court of the status of the case, and 2) recommend the disposition of any matter heard by him. The parties shall have ten (10) days from the date an interim report or recommendation is filed to file any objections. Any party opposing the objection(s) shall file an opposition within ten (10) days after the objection is filed. If no objection is filed, the Special Master's report or recommendation shall become a binding Order of the Court and the parties shall comply with the Order. If, however, an objection is filed, the matter shall be deemed submitted to the Court without oral argument twenty (20) days after the Special Master's report or recommendation is filed—unless an application is made and the Court orders the matter to be scheduled for hearing.

1 Reports or recommendations pertaining to non-dispositive motions or pretrial discovery
 2 matters shall be reconsidered by this Court only where the Special Master's report or
 3 recommendation is clearly erroneous or contrary to law.

4 **B. Fees and Costs of Special Master**

5 Unless the Court receives a recommendation from the Special Master for some other
 6 apportionment, each party shall bear the cost of the Special Master on a *per capita* basis, payable in
 7 advance. Upon the appointment of the Special Master, the parties shall meet and confer with the
 8 Master and develop a plan to set up a trust account whereby the parties shall deposit, initially,
 9 \$50,000 each to cover the anticipated fees and costs. The Special Master shall issue statements to
 10 the parties and draw from the trust account every 30 days for his or her performance of the
 11 appointment. The Special Master will bill at the rate of \$600.00 per hour.

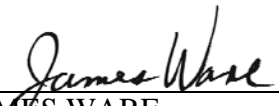
12 The Special Master shall report to the Court on a periodic basis, every 90 days, regarding the
 13 state of his fees and expenses and make a recommendation to the Court as to whether the trust
 14 account needs additional deposits from the parties as the case progresses.

15 **C. Nomination of Special Master**

16 The Court nominates Tom Denver of Mediation Masters.¹ The parties shall file any
 17 objections to Mr. Denver being named as Special Master on or before **December 17, 2009**. In their
 18 objections, the parties shall provide alternate nominations.

19 If no objection is filed and Mr. Denver accepts his appointment, Mr. Denver shall file an
 20 affidavit as required by FED. R. CIV. P. 53(b)(3). The Court's appointment of the Special Master
 21 shall become effective on **December 18, 2009**. Once the appointment is effective, the parties shall
 22 notice all relevant discovery and pretrial motions before the Special Master.

23
 24 Dated: December 9, 2009


 JAMES WARE
 United States District Judge

25
 26
 27 ¹ Mr. Denver is with Mediation Masters and may be reached at (408) 280-7883.
 28

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Elizabeth J. White bwhite@fenwick.com
J. David Hadden dhadden@fenwick.com
Lynn Harold Pasahow lpasahow@fenwick.com
Melissa J Baily melissabaily@quinnemanuel.com
Ryan Aftel Tyz rtyz@fenwick.com
Saina Sason Shamilov sshamilov@fenwick.com

Dated: December 9, 2009

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy